IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.288 OF 1994

The State of Maharashtra Appellant

Vs.

Sakharam Shivram Shinde Respondent
(Org. Accused)

Mr.R.Y.Mirza, APP for State.

Mr.Sachin B. Shetye, Advocate appointed for respondent.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

October 05 & 06, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. The State has filed this appeal challenging the acquittal of the respondent of the offence of murder under section 302 of IPC recorded by the Addl. Sessions Judge, Satara on 16/12/1993 in Sessions Case No.232 of 1992.

2. Briefly narrated the prosecution case is as under:

. The respondent-accused was facing the trial for murder of his eldest brother Savlaram Shinde on 28th February 1992. The respondent-accused was the youngest brother in the family of four brothers, the

other two brothers being Hariba and Baburao. All the four brothers had joint family land of two acres in village Soundari, Taluka Javli, Dist.Satara. On 22nd February 1992 two daughters of Hariba got married in the village. Deceased Savlaram had settled in Nerul in Dist. Thane. He had gone to village along with his wife and children to attend the said wedding. The respondent-accused, the youngest brother who was facing the charge of murdering his own wife in Bombay and was on bail in that case, had also gone to village Soundari to attend the wedding of the daughters of his brother Hariba. The residential houses of all the four brothers were in close vicinity in the same locality. Though the partition had taken place of the family land, there was dispute between the deceased Savlaram and the accused in respect of the partition of the land. It appears that accused was also having grievance against the deceased Savlaram as the latter did not help the accused in getting him released on bail in the murder case.

3. In the aforesaid background on 28th February 1992 at about 4 p.m. the accused went to the house of the deceased and asked him to accompany him for going for a walk. Both had gone out that evening by

Agundewadi pathway. Neither of the two brothers returned to their residence that day. On the following morning i.e. on 29/2/92 PW 3 Tanabai, the wife of the deceased started search for her husband when she saw accused returning to his house at about 6 a.m. When she enquired with the accused about the whereabouts of her husband, accused told her that he might be lying somewhere. Though Tanabai requested accused to accompany her for searching her husband, the accused declined stating that he had to go to Bombay to attend his Court case. Tanabai went out in search of her husband through the pathway leading to Agundewadi towards which both her husband and the accused had gone on the previous day. She found her husband lying in injured condition near Solashi river under a tree. The said area comes in the limits of Khambil-Chorage. According to Tanabai at that time deceased was in injured condition but was alive and on enquiry by her he told her that he was assaulted by the accused. She tried to give him water and also fetched tea for him. She then went to the house of Sarpanch PW 5 Mahadeo Jadhav and told him about the incident. Sarpanch went to the spot along with Tanabai to see the injured. He then went to the house of Police Patil along with Tanabai but Police Patil

was not in the house as he had gone out of town. Sarpanch told Tanabai not to remove the dead body until Police Patil arrives. They waited near the dead body along with Kotwal at village Khambil. On the following morning PW 6 Police Patil Hanmant Jadhav went to the spot where Tanabai narrated the incident to him. Police Patil Jadhav went to Medha police station and reported the matter to the police which was reduced to writing by the PSI and is produced on record at Exhibit 20. On the basis of the report of the Police Patil which was treated as FIR, crime was registered at about 8.15 p.m. on 1/3/1992. PW 12 PSI Patil took over the investigation and went to the scene of offence. The inquest panchanama of the dead body was drawn by the PSI which is produced at Exhibit 9. Thereafter the dead body was sent for post-mortem examination to Civil Hospital, Satara and scene of offence panchanama was drawn which is Exhibit 14. Under the spot panchanama six stones, one stick, one shirt, one blood stained shirt of deceased Savlaram which was lying near the dead body, one slipper pair and one cap stained with blood were seized. The earth smeared with blood as well as other earth was also attached under the spot panchanama which are muddemal article nos.1 to 7. Same day he recorded the

statements of few witnesses including Tanabai, wife of the deceased, PW 3 and other prosecution witnesses being PWs 4, 5, 7, 8 and 10. In order to arrest the accused Head Constable was sent to Bombay. Head Constable Potekar produced the accused on 3/3/1992 at the police station. He was arrested on that day at about 11 p.m. On 4th March 1992 the clothes from the person of the accused were seized under panchanama (Exh. 32) which are muddemal article nos.12 to 15. The statements of some more witnesses were recorded on that day. The blood sample of the accused was also collected by the Medical Officer. All the articles which were seized from the scene of offence as well as the clothes of the accused and the deceased were sent to C.A., Pune on 6th March 1992 for examination. After completion of the investigation charge-sheet was filed in the Court of JMFC, Medha on 13/4/1992 and the case was committed to the Sessions Court, Satara for offence under Section 302 of IPC.

4. Before the Sessions Court charge was framed for offence under Section 302 of IPC to which accused pleaded not guilty. On behalf of the prosecution 12 witnesses were examined including Dr.Ashtekar who conducted the autopsy on the dead body, Tanabai, wife

of the deceased, PW 5 Mahadeo Jadhav, Sarpanch of the village, PW 6 Hanmant Jadhav, Police Patil of the village, panch for the spot panchanama PW 2 Gunaji Kadam and the Investigating Officer PSI Patil PW 12.

The defence of the accused was of total denial.

5. The trial Court by the impugned judgment and order dated 16/12/1993 acquitted the respondent-accused by disbelieving the prosecution witnesses including Tanabai, wife of the deceased on the circumstance of accused was last seen in the company of the deceased. The said order of acquittal is under challenge in this appeal filed by the State.

6. As far as the homicidal death of the deceased is concerned the prosecution relies on the evidence of PW 1 Avinash Ashtekar who conducted autopsy on the dead body. The post mortem was conducted on 2nd March 1992 at about 12.35 p.m. He found following external injuries on the dead body of Savlaram:

(1) Scabbed wound over right and left eye-brow obliquely about 2 c.m. each.

(2) Scabbed wound over left forehead obliquely about 2 inches.

(3) Scabbed wound over left nose in middle, 1/3rd and maxilla about 1 inch.

(4) Contusion over right and left fore-head above eye-brow, blackish colour.

(5) Scabbed wound over the left wrist about 1/2".

(6) Contusion over left arm obliquely 1/2" x 1/2" - blackish colour.

(7) Contusion over right chest, obliquely 2" x 1" - blackish colour.

(8) Scabbed wound over both knee joint - 1/2" each.

(9) Contusion over left chest - transversely - 2" x 1" - blackish colour.

The cause of death according to the doctor was shock due to fractures of ribs nos. 2 to 6 on the left side and ribs nos.3, 4 and 5 on the right side with haemororax with (left side) fracture of mandible of left side, with fracture of maxilla of left side. He has deposed that external injury nos. 2, 3, 7 and 9 were on the vital parts of the body and external injury nos.7 and 9 might have caused profused bleeding. He has further deposed that in such type of injuries the death of victim occurs slowly. He has further deposed that external injury nos.1 to 9 are possible by stone article no.7 before the Court and stick muddemal article no.6. He has further stated that external injury nos.7 and 9 were sufficient in

the ordinary course of nature to cause death. According to the Medical Officer the victim must have died more than 48 hours after the injuries were caused. Considering the age of the victim Savlaram which was 70 years, doctor has stated that the fractures of ribs were possible if they were pressed by anybody.

7. The medical evidence and the number and kind of injuries suffered by the deceased leave no doubt that he had suffered homicidal death. In view of the aforesaid medical evidence the trial Court was also of the opinion that the death of Savlaram was homicidal one and it was neither natural or accidental nor suicidal death and, therefore, the question is whether it is the respondent-accused who was responsible for the death of Savlaram.

8. The case is based on circumstantial evidence as there is no eye witness to the incident of assault. The prosecution had relied on the following circumstances:

. (i) Motive; (ii) oral dying declaration made to PW 3 Tanabai; (iii) accused was last seen

together with the deceased; (iv) conduct of the accused in not accompanying PW 3 Tanabai for searching the deceased and giving evasive reply when asked about the whereabouts of the deceased and for leaving the village for Bombay on 29thFebruary 1992 on the pretext that he had to go to Bombay to attend his Court case and (v) lastly finding of blood group "A" on all the clothes of the accused which was also the blood found on the clothes of the deceased.

9. As regards the motive the prosecution has led the evidence of PW 3 Tanabai, the wife of the deceased. She has deposed that accused was asking the deceased to help him in the case in which he was charged for the murder of his wife but the deceased told him that he would not help him. She has also deposed that deceased had told the deceased that he would not give share to the accused in the land of his mother Bhimabai and, therefore, accused was having grudge against her husband. It is significant to note that after the murder of her husband came to light, Tanabai had told Sarpanch Mahadeo Jadhav PW 5 about the quarrel between the accused and deceased Savlaram regarding the partition of the joint family land as stated by Sarpanch in his deposition. Similarly

Tanabai had told Police Patil Hanmant Jadhav about the same. PW 6 Police Patil has deposed that Tanabai told him that accused assaulted her husband because he was not helped by her husband for getting bail and there were disputes about the land between her husband and the accused which also finds place in the FIR Exhibit 20 lodged by Police Patil at Medha Police Station on 1st March 1992 in this case. PW 10 Shivram Shinde, the son of the deceased has also supported the prosecution case about the aforesaid motive. He has deposed that relations between his father and the accused had become strained on account of the dispute of land and as his father did not help accused in getting him released on bail in the murder of his wife. The evidence about the motive led by the prosecution is not demolished in the cross-examination. Tanabai, wife of the deceased had spoken about it after the discovery of the dead body of her husband to the Sarpanch as well as to the Police Patil before the FIR was lodged by the Police Patil and, therefore, that finds place in the FIR Exhibit 20 lodged by the Police Patil and so it cannot be said that the evidence of motive was falsely raised subsequently with a view to implicate the accused. The argument raised on behalf of the defence is that

the dispute about the land between two brothers and the deceased not helping the accused for getting him released on bail in the murder case against the accused is not sufficient to constitute motive for the accused to commit murder of his own brother. We cannot agree with the said submission. As it is said that the motive remains locked in the mind of the accused it cannot be said whether particular reason is sufficient or not for the accused to commit murder.

10. The prosecution has also relied on the oral dying declaration of the deceased allegedly made to his wife PW 3 Tanabai. So far as the oral dying declaration is concerned, as deposed to by PW 3 Tanabai, the same cannot be believed as she does not appear to have told about the same to Sarpanch Mahadeo Jadhav PW 5 to whom she had approached after seeing the dead body of her husband nor she seems to have told about it to PW 6 Hanmant Jadhav, the police patil of the village who has filed complaint (Exhibit 20). PW 5 Sarpanch Jadhav has in his deposition stated that Tanabai told him that after search she found her husband Savlaram lying injured in the limits of Khambil and he was assaulted by Sakharam. He does not state that PW 3 had told him that on enquiry injured

Savlaram had told her that accused Sakharam had assaulted him. Similarly Police Patil Hanmant Jadhav, PW 6 has deposed that Tanabai went to his house weeping and crying and she told him that her husband was assaulted by accused and thrown in the limits of Khambil Chorage. If she had told about the oral dying declaration having been made to her by injured Savlaram to Police Patil Hanmant Jadhav, he would have mentioned it in the complaint (Exh.20) filed by him at the police station. Both these independent witnesses, Sarpanch as well as Police Patil, have deposed that she told them that accused had assaulted her husband but none of them has stated nor does it appear from the FIR that she told them that on enquiry by her, her husband told her that accused had assaulted him. In the absence of specific corroboration by these two witnesses and complaint (Exh.20) it would not be expedient to rely on the alleged oral dying declaration made by the deceased to PW 3 Tanabai.

11. The next circumstance relied on behalf of the prosecution is that the accused was last seen in the company of deceased before his dead body was discovered. In this respect the prosecution has relied on the evidence of number of witnesses

including wife of the deceased i.e. PW 3 Tanabai. According to Tanabai on 28th February 1992, which was a Friday, the accused had gone to her house at about 4 p.m. and asked her husband to accompany him for a walk. On the request of the accused her husband went out with him towards Agundewadi by pathway. She has deposed without any omission in that respect that at that time accused was wearing almond coloured shirt and black coloured pant on his person while her husband was wearing white half shirt and black coloured pant. At that time her husband was also wearing chappals in his feet and was carrying a stick in his hand. Her husband did not return that night. Following morning on 29/2/1992 at about 6 a.m. she left her house in search of her husband when she saw the accused Sakharam entering his house which is near the house of the witness. She enquired from the accused about the whereabouts of her husband to which he respondent by saying that her husband might be lying somewhere. She told him that her husband had left along with him and, therefore, he should be able to tell about the whereabouts of her husband and also requested him to accompany her for searching her husband. The accused however did not accompany her on the ground that he had to attend the Court in Bombay

meaning that he had to leave for Bombay on that day. After tracing the dead body of her husband the witness had contacted Sarpanch Mahadeo Jadhav PW 5 at about 11 a.m. on 29/2/1992 and told him that on the previous day accused and her husband had gone together from her house but her husband did not return. She had also told about this to Police Patil Hanmant Jadhav PW 6. Both these witnesses have corroborated PW 3 Tanabai for having told them about her husband having gone out with the accused on the earlier day. PW 5 Sarpanch Jadhav has stated about it in his deposition. Similarly we find PW 6 Police Patil Jadhav having mentioned about it in complaint (Exh.20) lodged by him at the police station on 1st March 1992. The prosecution has also relied on the evidence of some other witnesses in this connection.

12. It is the prosecution case that after the deceased left along with the accused at about 4 p.m. on 28/2/1992 they had gone to the liquor shop of PW 4 Babitai who has deposed that on that date at about 4 p.m or so the accused Sakharam and deceased Savlaram had been to her liquor shop and accused Sakharam asked for liquor and paid a sum of Rs.8/-. She has also mentioned about the clothes which were worn by the

accused at that time and identified the clothes of the accused in the Court. Then there is evidence of PW 9 Narayan jadhav who had also deposed that he had been to the shop of Babitai PW 4 on the day of the incident in the evening for drinking liquor. After consuming liquor when he came out he saw accused Sakharam and his brother Savlaram going to the said shop and next day he heard from PW 3 that her husband was killed by accused Sakharam. The evidence of these two witnesses has been criticized on behalf of the defence and not believed by the trial Court on the ground that the shop owner Babitai had stated in her cross-examination that she had not seen accused and Savlaram prior to the date of incident and she also does not appear to know PW 9 Narayan Master as she stated that she had heard the name of Narayan Master of village Saundari and denied that he had been to her shop on the date of the incident. In our view the trial Court has wrongly interpreted the evidence of PW 4 Babitai to mean that she did not know PW 9 Narayan Jadhav who used to visit her liquor shop. PW 9 Narayan Jadhav, known as Narayan Master is 75 years old. He has categorically stated that he used to visit shop of Babitai and he knew deceased as well as the accused and, therefore, there is no reason to discard the evidence of the said

witness when he deposed that he had seen two brothers entering the liquor shop in the afternoon on the date of the incident. Any way in our view even if the evidence of these two witnesses, PW 4 Babitai and PW 9 Narayan Jadhav, is excluded, the evidence of PW 3 Tanabai who had told the Sarpanch Jadhav and Police Patil Jadhav about the accused having gone to her house on the earlier day i.e. on 28th February 1992 and taken her husband deceased Savlaram with him on the pretext of going for a walk, as corroborated by the complainant Police Patil and the evidence of Sarpanch Mahadeo Jadhav whom she had approached at about 11 a.m. on 29/2/92, sufficiently proves that the deceased had left his house in the company of accused and thereafter his dead body was discovered.

13. As the deceased did not return that night she started search for her husband early morning on the following day. That time she saw accused returning home. Because deceased had left in the company of the accused on the earlier day she had naturally enquired of him about the whereabouts of her husband, but he replied evasively. The trial Court has not believed PW 3 on the ground that according to the prosecution case there was dispute between the

accused and her husband Savlaram regarding the partition of the ancestral land and the accused was having grudge against deceased Savlaram as the latter had not helped the accused in getting him released on bail when he was arrested in connection with the murder of his wife. According to the trial Court in view of the dispute between the two, deceased Savlaram would not have accompanied the accused knowing that accused was having grudge against him on account of the aforesaid two grounds and his wife Tanabai, who admits in her cross-examination that her husband was under her control, would not have allowed him to leave his house without her prior permission and she would not have allowed him to go in the company of accused Sakharam. The trial Court has, therefore, observed, that the evidence of Tanabai does not inspire any confidence when she deposed that her husband went with the accused on the earlier day in her presence. To say the least, the said reasoning is absolutely absurd and cannot at all be sustained in law.

14. The trial Court has also observed that the prosecution ought to have led the evidence of two ladies who had met Tanabai and told her that they had seen an injured person lying near the river when she

was searching her husband and examine Babu Zade and Balu Jadhav who had, according to her, accompanied her to the place where her injured husband was lying. In our view the evidence of above four persons was not at all relevant because the two ladies had only told Tanabai about having seen an injured person, whom they did not know, lying at the place where his body was found. Their evidence would not have been of any help to the prosecution as finding of the body of the deceased at the place from where it was recovered is not in issue. Similarly it is not the case of Tanabai that she told Babu Zade and Balu Jadhav about her deceased husband having left in the company of accused nor it is her case that she had told them that accused had assaulted him. In any event we are not giving any credence to the oral dying declaration allegedly made by the deceased to PW 3. But not believing Tanabai as regards the oral dying declaration allegedly made to her by her husband for some reasons cannot be the reason to discard the evidence of PW 3 Tanabai in entirety even as regards the accused having taken her husband along with him in the afternoon of 28/2/1992 on the pretext of going for a walk. The principle of *falsus in uno falsus in omnibus* is not applicable in our jurisprudence and the Court has to sift the grain

from the chaff while appreciating the evidence of the witnesses.

15. No doubt the prosecution wanted to rely on the evidence of two witnesses PW 11 Govind Kadam and Shankar Kadam, father of PW 8 Kisan who had seen the accused and the deceased quarrelling and having scuffle in the field of PW 8 Kisan Kadam and his father. PW 11 Govind Kadam had turned hostile and did not support the prosecution case. He has only stated in his deposition that when he was returning from village Lakhwad to his village Khambil through the way passing from Solshi river at about 7 p.m. on the day of the incident, he saw two persons going towards village Soundari. They were talking irrelevantly and shouting loudly but he did not recognize those two persons as accused Sakharam and deceased Savlaram and, therefore, he was declared hostile. The other witness on whom the prosecution was relying was Shankar Kadam, father of PW 8 Kisan Kadam. Shankar Kadam at the time of trial was bed ridden with paralytic attack. His son was examined as PW 8. He has deposed that his father Shankar told him that he saw scuffle in their field between accused and deceased Savlaram and accused assaulted Savlaram with stick and stones. His

deposition on this aspect does not have any evidentiary value inasmuch as his evidence was hearsay evidence and there was improvement. The prosecution seems to have examined him as there was difficulty in examining his father because of his being under paralytic attack. Initially the prosecution had applied for examining Shankar Kadam on commission and in spite of the opposition from the defence side, the trial Court had granted permission but ultimately the prosecution had refrained from examining him. The trial Court has, therefore, drawn adverse inference against the prosecution. For non examination of the said witness, who was admittedly under paralytic attack, the adverse inference cannot be drawn by the Court against the prosecution so as to discard the entire case of the prosecution. In the absence of the evidence of Shankar Kadam the Court has to consider the evidence which is led before it by the prosecution and the evidence led by the prosecution cannot be discarded because of the non-examination of Shankar Kadam as a prosecution witness on commission after permission was granted . It is different thing that the prosecution ought to have given the reasons for not examining the witness after obtaining permission to examine him on commission.

16. The next circumstance relied on behalf of the prosecution is the conduct of the accused. According to Tanabai PW 3, she saw accused returning home at about 6 a.m. on 29/2/1992. That time she enquired from him about the whereabouts of her husband as her husband had left with him from her house on the earlier day and thereafter he did not return. The accused gave evasive reply stating that he might be lying somehere. Tanabai deposes that she told him that when the deceased had left on the earlier day in his company, he must know the whereabouts of her husband and requested him to accompany her to search her husband which request was also turned down by him on the pretext that he had to go to Bombay to attend the case. The accused being brother of Savlaram certainly owed an explanation to the witness PW 3 when she enquired of him about the whereabouts of her husband. As stated earlier, we have no manner of doubt that there is convincing evidence on record that deceased had left along with the accused on the request of the accused on the earlier day for a walk and thereafter he did not return. The accused being the brother of missing Savlaram, his conduct in giving evasive reply and leaving for Bombay on that very day

without bothering to search his missing brother Savlaram is another circumstance which goes against the accused.

17. It is significant to point out that PW 3 has, without omission in her police statement, deposed about the clothes which the accused was wearing on the day he left along with her husband. Her statement was recorded on 2nd March 1992 and when the accused was brought from Bombay by the police constable and produced at the police station on 3rd March 1992 he was wearing the same clothes. That shows that PW 3 had correctly identified the clothes of the accused which he was wearing on 28th February 1992. In all probability he must have changed the clothes thereafter and again worn those clothes after washing them on the day he was apprehended by Head Constable in Bombay and brought to the village on the night of 3rd March 1992. Surely the witness Tanabai would not expect the accused to wear the same clothes when he was brought back to the village by the head constable and, therefore, the mention by her about the clothes which the accused wore on the day of the incident is absolutely trustworthy because accidentally the accused was found wearing the same clothes when he was

arrested on 3rd March 1992. This also lends support to the credibility of witness Tanabai when she deposed that accused was wearing almond coloured shirt and black coloured pant on the day of the incident when he left in the afternoon.

18. The prosecution has also examined PW 7 Namdeo Jadhav who is the nephew of the accused. He had met accused Sakharam on 29/2/1992 on his way to Medha. When he was asked by P.W.7 as to where he was going, the accused told him that he had to attend the Court and so he was going to Bombay. He has further stated that he found the accused in frightened condition. That time the witness was accompanied by his wife and child. The witness again met accused at Medha in front of Shinde hotel when again the accused told him that he was going to Bombay. The witness has deposed that at that time accused was wearing black pant and full shirt on his person. When P.W.7 returned to his village in the evening he learnt that accused had committed the murder of Savlaram. The witness is the son of sister of the accused and the deceased. Thus he corroborates PW 3 Tanabai that on that day accused was wearing black pant and full shirt and that he was going to Bombay to attend his case

which was also the reason given by the accused to Tanabai for not accompanying her to search deceased Savlaram. The trial Court has simply discarded the evidence of this witness on the ground that frightened condition of the accused as deposed to by the witness will not be sufficient to bring home the guilt of the accused. But the trial Court has lost sight of the fact that this witness corroborates Tanabai about the clothes the accused was wearing when he was going to Bombay and he was told by the accused that he was going to attend his Court case which he had told Tanabai also. It is relevant to point out that it was expected of the accused to have told his nephew about Savlaram missing on that day but he keeps quiet about Savlaram not returning home. In normal circumstance, the accused was expected to tell PW 7 about it as he was the nephew of both accused as well as the deceased. The witness learnt about it only after his return to his village in the evening.

19. The last circumstance on which the evidence is led by the prosecution is the finding of blood of group "A" on the clothes of the accused. After filing of the complaint on 1st March 1992 Head Constable was sent to Bombay in search of the accused. The accused

was brought to village and produced at the police station on the night of 3rd March 1992 when he was arrested by the Investigating Officer PW 12. On the following day the clothes which he was wearing on his person were attached under panchanama (Exh.34) in the presence of two panchas. Those clothes along with the clothes of the deceased which were attached under Exhibit 27 and the articles like earth and weapon of stick, cap, stones etc. were sent to the office of CA for examination. Significantly the clothes of the deceased, the blood stained earth collected from the place of offence, the blood stained stones, wooden stick as well as the clothes of the accused were found stained with human blood. Out of them the clothes of the deceased, wooden stick, stone as well as banyan and underwear of the accused were found stained with the blood of group "A". Full open shirt of the accused and full pant of the accused were found stained with human blood. The said circumstance has wrongly not been relied by the trial Court on the ground that the panch witnesses were not examined. The seizure of the clothes from the person of accused after his arrest was made under panchanama (Exh.34) as deposed to by the Investigating Officer PSI Patil PW 12. Thereafter they were sent to the office of CA

along with the other muddemal articles under the forwarding letter dated 6th March 1992 i.e. within two days after the seizure of the clothes of the accused. Thereafter CA report dated 30th June 1992 was received which is produced on record as Exhibit 40. In our view the trial Court was wrong in disbelieving the evidence of seizure of the clothes of accused for non examination of panchas. From the observations of the trial Court it appears that the panch witnesses were not examined because of their non availability. Except the non examination of the panchas the trial Court has not given any other reason to discard the evidence of the Investigating Officer. It is well settled that the evidence of the Investigating Officer can be believed as regards the recovery and seizure under Section 27 of the Evidence Act unless it is otherwise shown to be unreliable as held in the case of State Govt. of N.C.T. of Delhi v. Sunil & anr. reported in **(2001) 1 SCC 652**. We see no reason to disbelieve the evidence of I.O. because Panchas could not be examined due to their unavailability and when he is corroborated by the recovery panchanama.

20. It is argued on behalf of the accused that the seizure panchanama does not mention about any

blood having been noticed at the time of the seizure of the clothes of the accused. In our view that shows that the Investigating Officer did not falsely mention that the clothes of the accused were blood stained without having noticed any stains of blood on them. It is significant to point out that the CA report shows that underwear of the accused which was article no.13 appeared to be washed but was having stains of blood in the middle portion. Similarly the CA report (Exh.40) mentions that on the full pant of the accused article no.10 two small blood stains each of 1 c.m. in diameter situated on the right side pocket were noticed by the C.A. Similarly on the banyan of the accused CA had noticed few blood stains ranging from 0.1 c.m. to 1 c.m. in diameter spread on the backside. He had also detected blood on the shirt of the accused. The clothes of the accused naturally must have been washed as there was gap of clear three days from the time of incident which took place on the night of 28th February 1992 and 3rd March 1992 when he was apprehended by the Head Constable in Bombay. The colour of the shirt being almond and that of the pant being black, it might not have been possible for the bare eye to notice one or two small stains of blood found on the clothes which were washed and, therefore,

the Investigating Officer had faithfully and in all honesty did not falsely state that the clothes of the accused were stained with blood when they were seized under seizure panchanama (Exh.34). But they could only be noticed by the CA who naturally has instruments through which the dim and small stains of blood even on the coloured clothes can be observed. There is absolutely no reason to discard the CA report which is not even challenged on behalf of the accused as being false. If the Investigating Officer could not notice the blood stains on the clothes of the accused and the accused having washed his clothes he himself also must have been unable to see any stains of blood on his clothes and, therefore, had no hesitation to wear the same clothes again in Bombay before he was arrested by the Head Constable. Of course, he must not be apprehending his arrest on 3rd March 1992 by the Head Constable as he had conveniently left the village and went to Bombay after murdering his own brother to which there was no eye witness.

21. We, therefore, find that the prosecution has proved in this case beyond reasonable doubt firstly that the deceased had received homicidal death. Secondly the motive is proved against the accused.

Thirdly the prosecution has proved beyond any shadow of doubt that the deceased had left his house in the company of the accused at about 4 p.m. on 28th February 1992 and thereafter his dead body was found on the next day. The next circumstance proved against the accused is his conduct that though he was the brother of the deceased he gave evasive reply to Tanabai when enquired by her about the whereabouts of the deceased. When she had told him that he was bound to know his whereabouts as the deceased had left in his company, the conduct of the accused not accompanying her to search the deceased and leave for Bombay on the pretext of attending the Court case also is a circumstance which goes against the accused. When the deceased had left the house at the instance of and in the company of the accused he owed an explanation as to when and where he parted with the company of the deceased as observed by the Supreme Court in a recent decision in the case of Vinod Kumar v. State of Madhya Pradesh reported in **JT 2002 (2) SC 486**. Even when examined under Section 313 of Criminal Procedure Code and given an opportunity to explain the evidence which went against him, he has not stated as to where and when he parted the company of the deceased after having gone together for a walk. Nor

he has stated as to when he had to attend the Court in connection with the murder of his wife in Bombay. Next the finding of blood stains of group "A" on his clothes which were worn by him even on the date of the incident as per the evidence of PW 3 also completes the chain of circumstances which leaves no manner of doubt about the involvement of the accused in the murder of his brother Savlaram. No doubt as per the CA report the blood sample of the accused also showed that he was having blood of group "A" but it is not the case of the accused that he had suffered any injuries on his person which could have been the reason for finding of the human blood or blood of group "A" on his clothes. In his 313 statement he has not explained as to how the human blood of group "A" was found on his clothes. In the absence of any explanation by the accused about the blood found on his clothes the circumstance of finding of human blood on his all the four clothes and blood of group "A" on his banyan and underwear is a circumstance which clearly goes against the accused.

22. In view of the aforesaid evidence we have no manner of doubt that it is the accused who was responsible for homicidal death of his eldest brother

Savlaram on the evening or night of 28th February 1992 in the limits of village Khambil.

23. The judgment of the Supreme Court in the case of Lakhanpal v. State of M.P. reported in **AIR 1979 SC 1620** is cited on behalf of the respondent-accused which has no application to this case. That was a case where the accused and the deceased were together in the field prior to the occurrence and in the absence of motive it was held that the said circumstance by itself cannot lead to the irresistible inference that the accused must have murdered the deceased. In this case motive along with other circumstances is proved. The reliance by Mr.Shetye on the judgment of the Supreme Court in the case of Subimal Sarkar v. Sachindra Nath Mandal reported in **2003 (2) SCC 566** also will not be of any assistance to the accused. That was a case where the Supreme Court reiterated the principle that in a case based on circumstantial evidence the prosecution has to establish all the links in the chain of circumstances to prove that in all probability it was only the accused persons who could have committed the crime, which is done in this case. That was a case where the prosecution had proved the motive but not

other circumstances. It cannot be gainsaid that mere proof of motive can never be the basis for conviction of the accused. In the instant case not only motive is proved but other circumstances have also been proved as observed earlier.

24. In this connection reference may be made to the decision of the Supreme Court in the case of Vinod Kumar v. State of M.P. reported in **JT 2002 (2) SC 486**. That was a case where though there was absence of motive the Supreme Court had confirmed the conviction of the accused on the ground of last seen together holding that absence of motive would not destabilize the prosecution case. There was evidence of the prosecution witnesses who had seen the accused in the company of the deceased on the previous night and the body of the deceased was found in the village of the prosecution witnesses next morning and his car was found somewhere near the village. The accused persons were arrested next morning nearabout that village. It was held that the prosecution having proved that the deceased was in the company of the accused on the previous night it fell on the accused to establish the fact where and at what point of time they had parted company with the deceased. This not

having been done it was held that it led to the irresistible conclusion that the accused alone would have been responsible for the death of the deceased. Similarly in this case the prosecution having proved that the deceased had gone out with the accused and the accused pleading ignorance about the whereabouts of the deceased, the accused is liable to be convicted as the assailant of the deceased specially when his clothes, without any explanation coming forth from him, were found stained with blood group of the deceased. In this case in addition motive is also proved by the prosecution against the accused and his conduct showed his guilty mind.

25. From the aforesaid discussion it is crystal clear that the finding of the trial Court is based on reasons which are not at all sustainable in law nor consistent with the evidence on record and, therefore, the reasoning can be said to be perverse and, therefore, liable to be quashed and set aside in this appeal against acquittal. The trial Court has recorded the order of acquittal by not believing the prosecution evidence on flimsy grounds. We, therefore, have no alternative but to interfere in the order of the trial Court in this appeal against

acquittal and set aside the order of acqittal and convict the respondent-accused in accordance with law.

26. In the result, the appeal is allowed and the order of acquittal recorded by the Addl. Sessions Judge, Satara on 16/12/1993 in Sessions Case No.232 of 1992 is quashed and set aside and the respondent-accused is convicted for offence under Section 302 of IPC and sentenced to suffer RI for life and to pay a fine of Rs.1000/- in default to suffer SI for three months. The respondent-accused shall be entitled to set off under Section 428 of Cr.P.C. He shall surrender to his bail forthwith.

(S.S.PARKAR,J.)

(S.R.SATHE,J.)